

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action
)	No. 96-113P
)	
DELTA DENTAL OF RHODE ISLAND,)	
)	
Defendant.)	
)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement describing the proposed Final Judgment submitted to resolve this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On February 29, 1996, the United States filed a civil antitrust complaint alleging that Delta Dental of Rhode Island ("Delta"), enters into agreements with its participating dentists that unreasonably restrain competition by inhibiting discounting of fees for dental care in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint seeks injunctive relief to enjoin continuance of the violation.

Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for any further proceedings that may be required to

interpret, enforce, or modify the Judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

If this matter had proceeded to trial, the United States would have introduced evidence as follows. Delta is Rhode Island's largest dental insurer, insuring or administering plans providing insurance to about 35-45% of Rhode Island residents covered by dental insurance. Delta seeks to offer its enrollees the broadest possible panel of dentists and contracts with over 90% of Rhode Island dentists. Delta accounts for a substantial percentage of the professional income of most Rhode Island dentists.

Pursuant to Delta's Participating Dentist's Agreement (the "Agreement"), each contracting dentist agrees to comply with Delta's Rules and Regulations. Rule 10 of these Rules and Regulations is a Most Favored Nation (MFN) clause, which provides that Delta has the right to lower the fees it pays a dentist to the level of the lowest fees that that dentist charges any other plan. Delta has applied its MFN clause also to dentists' charges to uninsured patients. Rule 7 gives Delta the additional right to audit dentists' records to determine whether they are complying with the MFN clause.

In contrast to Delta's program, which by design includes as many dentists as possible, some dental plans such as preferred provider organizations ("PPOs") and health maintenance

organizations ("HMOs"), contract selectively with a limited panel of dentists. By offering the prospect of increased patient volume, these managed care plans are able to contract with some dentists for services at fees substantially below Delta's. These plans then create financial incentives for their enrollees to use panel dentists. Selective contracting with dentists helps a managed dental care plan lower the cost of the delivery of dental services to its enrollees. Accordingly, these plans are able to offer patients lower premiums and lower out-of-pocket costs.

Delta currently provides so much more of most Rhode Island dentists' income than would any entering managed care plan that if these dentists were to reduce their fees to such plans, the resulting reduction in their income from Delta would be much greater than their added income from the entrant plan. Because few dentists in Rhode Island are not under contract with Delta, and because Delta's MFN clause gives its participating dentists strong disincentives to contract with dental managed care plans at fees below Delta's, other plans have been unable to form a competitively viable panel. By thus excluding from the dental insurance market reduced-cost plans that many consumers view as an important option, Delta's MFN clause has protected Delta from competition from such lower-cost plans at the expense of consumers.

In recent years, Delta's MFN clause has blocked the entry or expansion of several low-cost plans. For example, Delta's MFN clause caused dentists to withdraw from Dental Blue PPO -- a low-

cost preferred provider organization established in the fall of 1993 by Blue Cross and Blue Shield of Massachusetts to serve Raytheon employees and their dependents, including the approximately 1,000 employees and their dependents at Raytheon's facility in Portsmouth, Rhode Island. Dental Blue PPO had initially succeeded in contracting with a number of Rhode Island dentists at substantially discounted rates -- rates, by Delta's calculations, that were 14% lower than Delta's. These PPO savings would have significantly reduced or eliminated Raytheon plan members' co-payments.

After identifying Dental Blue PPO as a long-run competitive threat, Delta's senior management pursued several related tactics. First, it contacted the former chairman of the Rhode Island Dental Association ("RIDA")'s Council on Dental Programs, who supports Delta's MFN clause because he believes it sets a floor on dentists' fees. He sent RIDA's members a letter warning that because of Delta's MFN clause dentists would face "severe financial penalties" if they contracted with Dental Blue PPO. Second, Delta's management sent a letter to Rhode Island dentists who Delta knew to be participating in Dental Blue PPO, announcing its intention to apply its MFN clause and describing the new, reduced payment levels they would receive from Delta if they continued to participate in Dental Blue PPO.

By the end of January 1994, all of the dentists contacted by Delta had withdrawn from Dental Blue PPO. Some of them made clear to Delta at the time that the reason for their withdrawal

was Delta's decision to apply its MFN clause and requested that Delta return their payments to former levels. As a result, Raytheon employees were denied the opportunity to lower or eliminate their co-payments for dental care, and Rhode Island was denied the entry of a low-cost dental insurance plan.¹

Delta's MFN clause also caused dentists to refuse to contract, at fees below levels paid by Delta, with at least two other lower-cost plans. In one instance, U.S. Healthcare attempted to establish a plan in Rhode Island (as it had in other states) that would have paid dentists at fee levels lower than Delta's. Rhode Island dentists uniformly refused to participate because they feared that Delta would apply its MFN clause. Similarly, Delta's participating dentists refused, because of Delta's MFN clause, to contract with Dental Benefit Providers ("DBP") at fee levels below Delta's, forcing DBP to pay Delta's higher rates to enter the market and depriving consumers of a low-cost alternative.

¹ Delta's application of its MFN clause to the Dental Blue PPO demonstrates that Delta has not enforced the clause when a dentist, who had initially agreed to charge another plan substantially lower fees, then raised the fees to Delta's level or disaffiliated from the plan. Delta's approach suggests that Delta applied its MFN clause to prevent the entry of a new, low-cost rival, not just to ensure that it obtained the lowest prices available.

Delta indeed did develop a contingency plan to compete on price with Dental Blue PPO by forming its own limited-panel, reduced-fee PPO. When Delta's MFN clause brought about the collapse of the Dental Blue PPO, however, Delta shelved its PPO plans. Rhode Island consumers thus remained without a limited panel, lower-cost competitive alternative to Delta's existing, mid-range plan.

Delta's MFN clause also prevented two other organizations--a self-insured employee group and an uninsured retiree group--from recruiting additional dentists, at fee levels substantially below Delta's, to augment their limited panels of dentists. Both had persuaded a few Rhode Island dentists to accept fees substantially below Delta's and both had avoided the application of Delta's MFN clause -- despite Delta's commitment to enforce the clause -- only because Delta had been unaware of their operation. Although both wanted to expand their panels, they refrained from recruiting additional dentists because of their concern that such efforts would disclose their existence to Delta and trigger Delta's enforcement of its MFN clause, causing their existing dentists to disaffiliate. As a result, some members of these groups were denied more accessible, low-cost dental care that would have been available in the absence of the MFN clause.

Although the language of Delta's MFN clause appears to apply only to fees dentists offer to insurance plans, Delta has also on occasion enforced the MFN when dentists have lowered their fees to uninsured patients. Some dentists who have been willing to serve uninsured patients at reduced rates have suffered an added financial penalty imposed by Delta. As a result, they and other dentists have been deterred from offering discounts to uninsured patients. Delta's MFN clause has thus raised the prices, and reduced the availability, of dental services to some of Rhode Island's most vulnerable consumers.

By Delta's own admission, its MFN clause has not generated any meaningful savings or other procompetitive benefits. Far from saving consumers money, Delta's MFN clause has, in fact, eliminated most discounting by dentists below Delta's fees, and -- as recognized by the former chairman of the RIDA's Council on Dental Programs -- set a floor on dental fees, thus raising the costs of dental services and dental insurance for Rhode Island consumers.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Plaintiff and Delta have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission by any party of any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. Section X(C) of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is intended to ensure that Delta eliminates its MFN clause and ceases all similar practices that unreasonably restrain competition among dentists and dental insurance plans.

A. Scope of the Proposed Final Judgment

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to Delta, to its successors and assigns, and to all other persons (including Delta's participating dentists) in active concert or participation with any of them, who shall have received actual notice of the Final Judgment by personal service or otherwise.

In the Stipulation to the proposed Final Judgment, Delta has agreed to be bound by the provisions of the proposed Final Judgment pending its approval by the Court.

B. Prohibitions and Obligations

Under Section IV(A) of the proposed Final Judgment, Delta is enjoined and restrained for a period of ten years from maintaining, adopting, or enforcing any Most Favored Nation Clause or similar provision in any Participating Dentist's Agreement or by any other means or methods. Other provisions of the Final Judgment seek to ensure that the MFN clause's anticompetitive effects cannot be achieved in other ways. Specifically, Section IV(B) enjoins Delta from maintaining, adopting, or enforcing any policy or practice varying its payments to, or other treatment of, any dentist because the dentist charges any non-Delta patient or plan a fee lower than the fee the dentist charges Delta; Section IV(C) enjoins Delta from taking any action to discourage any dentist from participating in any non-Delta plan or from offering or charging to any non-Delta patient, or any non-Delta plan, any fee lower

than that paid to the dentist by Delta; and Section IV(D) enjoins Delta from monitoring, auditing, or obtaining from any dentist information about the fees a particular dentist charges any non-Delta patient or any non-Delta plan, except as provided in Section V.

Section V permits Delta to engage in certain specified activities without violating the prohibitions of Section IV, including creation of a limited-panel plan, implementation of different reimbursement levels under certain circumstances, and collection through certain means of information about market rates. These activities will likely facilitate, rather than impair, competition.

Section VI of the Final Judgment declares Delta's MFN clause null and void. It directs Delta to disseminate to each Delta participating dentist revised Rules and Regulations, referenced in the Participating Dentist's Agreement, that omit the Most Favored Nation Clause. This Section also requires Delta to eliminate the Most Favored Nation Clause from all Participating Dentist's Agreements entered into after entry of the Final Judgment.

Section VII of the Final Judgment imposes various compliance measures. Section VII(A) requires Delta to distribute, within 60 days of entry of the Final Judgment, a copy of the Final Judgment to: (1) all Delta officers and directors; and (2) all Delta employees who have any responsibility for approving, disapproving, monitoring, recommending, or implementing any

provisions in agreements with participating dentists. Sections VII(B)-(D) require Delta to provide a copy of the Final Judgment to future officers, directors, and employees who have any responsibility for approving, disapproving, monitoring, recommending, or implementing any provisions in agreements with participating dentists and to obtain and maintain records of such persons' written certifications that they have read, understand, and will abide by the terms of the Final Judgment. Section VII(E) requires Delta to distribute a copy of a letter, approved by the Antitrust Division and attached to the Final Judgment, to all currently participating dentists. Section VII(F) obligates Delta to report to the Plaintiff any violation of the Final Judgment.

Finally, Section VIII obligates Delta to certify its compliance with specified requirements, summarized above, of Sections IV, V, VI, and VII of the Final Judgment. In addition, Section IX sets forth a series of measures by which the Plaintiff may have access to information needed to determine or secure Delta's compliance with the Final Judgment.

C. Effect of the Proposed Final Judgment on Competition

By eliminating the MFN clause, the relief imposed by the proposed Final Judgment will enjoin and eliminate a substantial restraint on price competition between Delta and other dental insurance plans and among dentists in Rhode Island and its environs. It will do so by eliminating the disincentives created by the MFN clause for dentists to discount their fees and to join

non-Delta plans offering payments below Delta's levels. The Judgment also prevents Delta from taking any other action to discourage dentists from discounting or participating in competing dental insurance plans. Consequently, non-Delta plans' efforts to attract and maintain viable panels of dentists to serve their members will no longer be hampered.

The proposed Final Judgment will restore the benefits of free and open competition to dental insurance plans and consumers in Rhode Island. Consequently, limited panel dental insurance plans should be able to achieve cost savings that they can pass on to consumers, and consumers should be able to choose from a wider array of dental insurance alternatives. Competition among dentists should also be invigorated.

IV.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. Such a trial would involve substantial costs to both the United States and Delta and is not warranted because the proposed Final Judgment provides all of the relief that the United States would likely obtain upon a favorable decision at the close of trial and fully remedies the violations of the Sherman Act alleged in the Complaint.

V.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited

by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no prima facie effect in any subsequent lawsuits that may be brought against Delta in this matter.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Gail Kursh, Chief; Health Care Task Force; Department of Justice; Antitrust Division; 325 7th Street, N.W.; Room 404; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is necessary to protect the public interest. The proposed Final Judgment itself provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or

appropriate for the modification, interpretation, or enforcement of the Judgment.

VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment. Consequently, none are filed herewith.

DATED: February 19, 1997

Respectfully submitted,

/S/
Steven Kramer

/S/
William E. Berlin

/S/
Mark J. Botti

/S/
Michael S. Spector

/S/
Richard S. Martin
Attorneys,
Antitrust Division
U.S. Department of Justice
325 7th Street, N.W.
Room 426
Washington, D.C. 20530
(202)307-0997